Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	DA 12-1873 and DA 12-1877
Wireless Bureau and OET Seek Comment	)	
On Progeny's M-LMS Field Testing Reports	)	WT Docket No 11-49
	)	

To: Office of the Secretary
Attn: Chief, Wireless Telecommunications Bureau
Attn: Chief, Office of Engineering and Technology

Comments on the Progeny Test Reports
And
Motion to Strike Alleged Confidential Information
(this replaced the first filed Comments)

The undersigned entities ("SkyTel")[1] hereby comment on the Progeny testing and test reports ("Test" and "Test Reports") referenced in DA 12-1873.

SkyTel also submits below a Motion to Strike.

Motion to Strike

For reasons given in Exhibit 1 below, the information in the Test Report that was withheld from unfettered public access should be stricken.

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Comments

- I -

Initially, SkyTel references and incorporates herein their prior filings in his docket, including on the prior Progeny tests that were also put out for comment in this Docket. That

[1] Note, V2G LLC, a company managed by Warren Havens, does not at this time join in these Comments. It may, however, Reply to these Comments and other Comments.

included a technical review done by Dr. Nishith Tripathi. Progeny did not, thus far, affectively address (i) the principal assertions and conclusions in the Tripathi review and (ii) the other principal aspects of the past SkyTel submissions in this Docket, both of which have critical relevance to the Test and Test Reports.

Petitioners hereby reference and incorporate their past and pending pleadings that challenge Progeny having improperly obtained its M-LMS licenses in the first place. Those matters should be determined first prior to any additional licensing actions. This proceeding is a good example: there are numerous parties having to spend time and resources to make comments and the Commission needs to read these. In the time it would take the Commission to complete review and make a decision on the current phase of the instant Progeny proceeding under WT Docket No. 11-49, the Commission could easily decide upon the pending challenges to Progeny's licenses and auction applications, which involve far less filings and facts, then in the current Docket No. 11-49.

There is new information in the pending challenge proceedings that the FCC has not yet addressed. Both in what Commenters have presented in their petitions and appeals, and what Progeny has stated in response as to affiliates it had at the time of the first LMS auction, but never disclosed.

Progeny has just recently admitted that Frenzel and Progeny had affiliates that were not disclosed at time of LMS auction—see Progeny Motion for Leave to File Sur-Re[ly and Sur-Rely In Further Opposition to Application for Review filed August 8, 2012 regarding File Nos. 0003250058 and 0003274382 (e.g. admission to spouse and children affiliates not previously disclosed). That is admission of false certification, over 13 years late. That is clear evidence of misrepresentation and lack of candor. The instant proceeding should be held in abeyance until that matter is resolved, since if Progeny made false certifications, then its Form 601 is subject to

disqualification under FCC auction rules, and Progeny is subject to disqualification as a licensee for lack of character and fitness.

In addition the instant proceeding is a public proceeding, but substance is in a private proceeding by the FCC establishing a protective order, DA 12-1877, and allowing Progeny to file portions of its test reports confidentially, whereby only certain qualified parties are able to obtain those records in the protective order. That is wrong and makes the entire proceeding defective. If Progeny wants to be able to proceed under the waiver it sought and had granted, then it should have to release information publicly. There is nothing in the FCC LMS rules saying that testing is subject to confidentiality. In fact, that defeats the purpose of the FCC's LMS rules.

There is nothing confidential about the existence of a Part 15 network. If Progeny has only tested with some of the known entities, then it has not completed the required testing. Progeny never asked the FCC to clarify what the FCC meant by the LMS rules requiring testing, and if it did so, when the rule is vague to begin with, then it would have had to file a petition for rulemaking to clarify the rules, including if Progeny wanted to limit that rule to mean it can pick and choose the Part 15 networks it can test against and what is meant by minimizing effects on Part 15. What Progeny is trying to do is tantamount to ultra vires rulemaking: where Progeny will assert that its confidential, private testing has met its self-defined standard, and that that is now is the *de facto* standard for the LMS radio service.

Also, many Part 15 network users are public agencies or businesses that are regulated and subject to state laws analogous to FOIA (e.g. utilities with Part 15 networks). Thus, any testing reports with any such entity cannot be confidential. Those types of entities are the main Part 15 users. Therefore, if Progeny is conducting tests with such entities, then it cannot seek confidentially of that information and should file it publicly in the docket, and not make

commenters seek it via requests under state open records laws.

- II -

The Progeny Test and Test Report are defective for reasons given in Exhibit 1 hereto.

- III -

Failures of Test Purpose and Purpose Requirements.

The purpose and essential requirements of the Progeny test is set forth by the FCC in the Order granting to Progeny several rule waivers, DA 11-2036, ¶ 25, as follows (emphasis and numbers in brackets added):

> …Included in these rules is the obligation, set forth in Section 90.353(d), that Progeny demonstrate through actual field tests that its M-LMS system will not cause unacceptable levels of interference to Part 15 devices.85 As the Commission noted, the purpose of the testing condition "is to insure that multilateration LMS licensees, when designing and constructing their systems, take into consideration a goal of minimizing interference [1] to existing deployments or systems of Part 15 devices in their area, and [2] to verify through cooperative testing that this goal has been served."86.
> ---
> 85. 47 C.F.R. § 90.353(d).
> 86. LMS MO&O, 12 FCC Rcd at 13968 ¶ 69.

Notwithstanding the fact that the Progeny Test Reports failed to show that its system will not cause unacceptable interference to Part 15 systems, as noted by several commenting entities in this docket, including RKF Engineering, Petitioners note the following: the Progeny Test Reports are only for testing against 3 entities' Part 15 networks, one of whom, WISPA, has commented in the docket that Progeny's system will cause its users unacceptable interference. Thus, Progeny has fallen far short of the requirement to test against "existing deployments or systems of Part 15 devices" in its licensed areas, which are nationwide in scope, and since it has not done cooperative testing with the numerous other Part 15 operators in the band. Thus, Progeny has still not met this purpose since it did not do either of the two underlined requirements that the FCC instructed.

Relevant M-LMS rules to the subject Test and Test Report include the following:

47 CFR 90.353 - LMS operations in the 902-928 MHz band. (emphasis added)

§ 90.353 LMS operations in the 902-928 MHz band.

LMS systems may be authorized within the 902-928 MHz band, subject to the conditions in this section. LMS licensees are required to maintain whatever records are necessary to demonstrate compliance with these provisions and must make these records available to the Commission upon request:

(a) LMS operations will not cause interference to and must tolerate interference from industrial, scientific, and medical (ISM) devices and radiolocation Government stations that operate in the 902-928 MHz band.

(b) LMS systems are authorized to transmit status and instructional messages, either voice or non-voice, so long as they are related to the location or monitoring functions of the system.

(c) LMS systems may utilize store and forward interconnection, where either transmissions from a vehicle or object being monitored are stored by the LMS provider for later transmission over the public switched network (PSN), or transmissions received by the LMS provider from the PSN are stored for later transmission to the vehicle or object being monitored. Real-time interconnection between vehicles or objects being monitored and the PSN will only be permitted to enable emergency communications related to a vehicle or a passenger in a vehicle. Such real-time, interconnected communications may only be sent to or received from a system dispatch point or entities eligible in the Public Safety or Special Emergency Radio Services. *See* subparts B and C of this part.

(d) Multilateration LMS systems will be authorized on a primary basis within the bands ***[1]*** 904-909.75 MHz and ***[2]*** 921.75-927.25 MHz. Additionally, multilateration and non-multilateration systems will share the ***[3]*** 919.75-921.75 MHz band on a co-equal basis. Licensing will be on the basis of Economic Areas (EAs) for multilateration systems, with one exclusive EA license being issued for each of these three sub-bands.

Except as provided in paragraph (f) of this section, multilateration EA licensees may be authorized to operate on only one of the three multilateration bands within a given EA.

Additionally, EA multilateration LMS licenses will be conditioned upon the licensee's ability to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to 47 CFR part 15 devices.
* * * *

(f) Multilateration EA licensees may be authorized to operate on both the 919.75-921.75 MHz and 921.75-927.75 MHz bands within a given EA (*see* § 90.209(b)(5)).

(g) Multilateration LMS systems whose **primary** operations involve the provision of **vehicle location services**, may provide non-vehicular location services.

(h) Non-multilateration stations are authorized to operate on a shared, non-exclusive basis in the 902-904 MHz and 909.75-921.75 MHz sub-bands. Non-multilateration systems and multilateration systems will share the 919.75-921.75 MHz band on a co-equal basis. Non-multilateration LMS systems may not provide non-vehicular location services. The maximum antenna height above ground for non-multilateration LMS systems is 15 meters.

Below, we discuss why the Progeny Test and Test Report are defective under various provisions of the above principal M-LMS rule:

1. Regarding §90.353(a). The FCC purpose appears at least to be (and should be) to find out if Progeny's proposed systems will comply with the interference aspects of the rule above, in its relevant subsections. However, as we commented in this Docket earlier, Progeny is not testing and showing results of testing regarding the requirement in §90.353(a) in its two critical aspects (i) testing with the Government to show non-interference to the described Government operations, and (ii) testing with the Government to show that the Progeny proposed systems are viable—can operate viably in presence of the Government operations. This is a waiver proceeding under a provisional waiver (subject to acceptable testing, etc.), and waivers cannot be granted if the relief will not result in a viable solution.

It could not be more clear that under the FCC rulemaking orders on M-LMS that the sole intent was for a large spectrum band, in a range suitable for very wide area communications and high capacity, to server the nation's need for advanced Intelligent Transportation Systems ("ITS")[2]—and that ITS is in large part based upon Government (federal agency, including DOT) policies and programs, and that also involved other Government programs (including DOA, in

[2] This is summarily reflected in §90.353(g): the primary M-LMS services is vehicle location, and only if that is preformed, can secondary services be provided.

terms of weather information, DHS in terms of special emergencies involving critical roadway situations, DOE, in terms of Vehicle-to-Grid developments nationwide, etc.) These Government entities use 902-928 MHz and made clear to the FCC and bidders for M-LMS licenses, via DOC-NTIA letters placed in the M-LMS dockets leading to the auctions, that they reserved this use. SkyTel met with NTIA many times for this purpose, to make clear that their planned M-LMS use was supportive of the Government ITS goals and these related goals and programs.

For this reason alone, the Progeny Test is defective.

2. Regarding §90.353(b): Progeny does not test this function, and this its Test is defective. Radiolocation is not effective if not communicated back to the system. If Progeny intends to give up this communications function, it did not state that, and thus, it must be assumed that Progeny will use this function, but did not test it. We commented in this Docket on this matter. Progeny appears to be employing a Trojan Horse approach: see the details we provided earlier is support.

3. Regarding §90.353(d) and (f) Progeny holds B and C block licenses in the same markets, and shares the B block with nonmultilateration licenses and uses. Testing is not effective in it does not involve the B and C blocks and both nonmultilateration systems and part 15 systems.

4. Regarding §90.353(g). The primary operations of M-LMS are ***vehicle location services***, and only if this primary operation- service is provided, can non-vehicular operations-services be provided. M-LMS tests under §90.353(d) fail where the M-LMS primary operation-service is not involved in the test, along with any ancillary operation-service. SkyTel commented on this in earlier submissions in this Docket. Indeed, the Progeny description of its system and goals appears directly contrary to this core rule of M-LMS. This rule summarizes the entire purpose of M-LMS allocation in the first place, indicated in Part 90, Subpart M nomenclature.

Radio service for Intelligent Transportation (vehicular) Systems. Progeny, instead, describes location technology and service primarily for non-vehicular applications, even indoor applications.

- IV -

The Progeny system, Test and Test Report are impermissibly contrary to the core M-LMS rule and purpose. This is in part discussed above in the discussion of §90.353(g). It is further discussed in our earlier filings in this Docket. It is further discussed in our many filings in Docket 06-49, including those that describe and cite from M-LMS rulemaking Orders as to the FCC's understanding, as a premise of M-LMS operations being able to coexist with Part 15 system operations. That is since (i) M-LMS purpose is ITS, reflected in §90.353(g) statement of the primary operations, and the ancillary ones permitted only if the primary operations are provided, and (ii) M-LMS for ITS focuses the radio transmissions on the major roadways and their peak hours of traffic, which is very substantially separated from the major areas and times of Part 15 system operations. By impermissibly deviating from this core purpose and rule, Progeny avoids this FCC premise of interference management.

As we argued previously in this Docket and in 06-49, the FCC made a wise and technically sound decision to allocate M-LMS for ITS, and pin that down in the noted core rule. It should not allow, by waiver or other means, to deviate from that.

[Execution on next page.]

Respectfully submitted, December 21, 2012,

Skybridge Spectrum Foundation, by
[Filed electronically. Signature on file.] Warren Havens, President

Telesaurus Holdings GB LLC, by
[Filed electronically. Signature on file.] Warren Havens, President

Environmentel LLC (formerly known as AMTS Consortium LLC), by
[Filed electronically. Signature on file.]
Warren Havens, President

Verde Systems LLC (formerly known as Telesaurus VPC LLC), by
[Filed electronically. Signature on file.]
Warren Havens, President

Intelligent Transportation & Monitoring Wireless LLC, by
[Filed electronically. Signature on file.]
Warren Havens, President

Warren Havens, an Individual
[Filed electronically. Signature on file.]
Warren Havens

Each Petitioner:

2509 Stuart Street, Berkeley, CA 94705
Phone: 510-841-2220. Fax: 510-740-3412

Unless inaccurate practice is intended and invited, these are not "*Havens*" individually or in the aggregate. Each undersigned entity is a separate legal entity, with different ownership, financial, asset and other elements, shown in these entities various licensing disclosures. In addition, Skybridge is a fully nonprofit corporation under IRC §501(c)(3) no part of whose assets may be used or distributed for the benefit of any private individual or for-profit entity, including the other SkyTel entities. Skybridge is not permitted under law to provide any benefit to said other entities and is not their "affiliate" under FCC and nonprofit law. *As previously stated in various FCC proceedings, each SkyTel entity objects to the FCC and others, characterizing these entities as "Havens."* In FCC formal proceedings, unless good cause is asserted, the parties (and FCC staff) should respect elements of law outside FCC jurisdiction. Legal entities' character, differences, names, etc. are under State law, and in the case of a most nonprofits like Skybridge, also under federal IRC-IRS law.

Emphasis added.

Critical Mass Energy Project, Appellant v. Nuclear Regulatory Commission, and Institute for Nuclear Power Operations, Appellees

No. 90-5120

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

931 F.2d 939; 289 U.S. App. D.C. 301; 1991 U.S. App. LEXIS 7596

March 11, 1991, Argued
April 30, 1991, Decided

* * * *

In the wake of the Three Mile Island accident, the nuclear electric utility industry formed INPO, a voluntary membership organization designed to promote safety and reliability in nuclear power plant operations through peer review. INPO, which is comprised of and funded by utility companies that operate or construct nuclear plants in the United States, employs approximately 400 engineers and other staff. One of INPO's principal programs is the Significant Event Evaluation and Information Network ("SEE-IN"), a system for collecting, analyzing and sharing information concerning construction and operations experiences within the nuclear power industry.

* * * *

INPO currently distributes copies of its SEE-IN reports to all INPO members and "participants," 1 to the Nuclear Safety Analysis Center (a membership organization of utilities engaged in the commercial production of electricity) [**5] and to Nuclear Electric Insurance Limited (an insurer of INPO utilities). In addition, INPO provides copies of particular reports to vendors whose products are mentioned in those reports, and to outside consultants and contractors where necessary to take corrective action suggested by the reports. Pursuant to a 1982 Memorandum of Agreement providing for the free exchange of nuclear safety information between INPO and the Government, INPO also transmits copies of all SEE-IN reports to the Commission. INPO sends its reports to each of the foregoing recipients with an understanding that the reports will not be disclosed to additional third parties without INPO's consent. 2

* * * *

CONCUR

RANDOLPH, Circuit Judge, [**27] concurring, in which Circuit Judge WILLIAMS joins.

> Section 552(b)(4) of the Freedom of Information Act exempts from disclosure "commercial . . . information obtained from a person and . . . confidential." This is rather straightforward language. The information must be commercial and the government must have received it from another. There is no doubt that the reports INPO voluntarily provided to the Nuclear Regulatory Commission fit that description. Are they "confidential"? If ordinary usage controlled, there would also be no doubt that they were. The reports are "conveyed [and] acted on . . . in confidence" and they are "not publicly disseminated." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 476 (1981).
>
> In light of our decision in National Parks & Conservation Ass'n v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765 (D.C. Cir. 1974), however, it is not enough to satisfy the language of exemption four. National Parks added - or, as has been said, "fabricated, out of whole cloth" - an additional requirement that must be met before confidential information is exempt from disclosure. Note, Trade Secrets and the Fifth Amendment, 54 U. CHI. L. REV. 334, 364 (1987). [**28] The following [*948] "objective" test must be satisfied: information qualifies for exemption as "confidential" if [1] its disclosure would impair the government's ability to obtain necessary information in the future, or [2] if its disclosure would place the source of information at a competitive disadvantage. National Parks, 498 F.2d at 770.

Applying the above:

Progeny elected to supply information to the Government that it asserted was confidential, as in the case above. The information cannot be held by the FCC has confidential under the test above since it fails to meet either of the two criteria above.

As to the first test, the FCC does not require the subject particular information in the first place. Further, Part 15 operations are not confidential, nor is their equipment and systems (not any measureable results). Nor is any M-LMS operations confidential, or its equipment and systems (again, not any measureable results). The issue of radio interference or not, takes place in the public air waves and is not secret, and cannot be under the Communications Act (but for covert governmental systems of some kind).

As to the second test, Progeny cannot assert a competitive disadvantage in providing information in its attempt to comply with a FCC rule that is a basis of competition

in the first place: here, to conduct certain testing. Nothing in the rule, or the rulemaking orders in this subject "testing" rule (within §90.353(d)) suggests, or allows an interpretation, that to comply with this rule, in public use of the M-LMS frequencies in relation to public use of the same frequencies on a Part 15 basis, Progeny can employ tests the results of which, in any relevant part, can be confidential. If there are aspects of the equipment involved that are confidential (as is the case in any OET equipment authorization or certification test reports), that is another matter: but that is not relevant to the testing of the actual radio transmission and reception of transmissions by the Progeny radios and Part 15 radios. (Irrelevant matter should not have been submitted, only to withhold it, if that was done. That would be an abuse of process.)

Thus, it was improper for Progeny and the cooperative testers, and for the FCC, to withhold from public view, any part of the Test Report for this reason alone (apart from others). Information that is cannot lawfully be withheld under FOIA, cannot be treated as confidential, especially where the Government puts out the material (but for withheld parts) on public notice calling for comment.

Use of a protective order to restrict said information to attorneys other parties is restrictions on this public access to the information. In this case, that was improper.

This withholding of the subject information in the Test Report taints the proceeding and makes a decision on it subject to reversible error, since information of apparent decisional importance was improperly withheld to the public, whose members had a right to comment, based on the unredacted Test Report.

In addition, the redaction is impermissible for reasons given in the following case (see highlighted parts):

AMERICAN RADIO RELAY LEAGUE, INCORPORATED, PETITIONER v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS; AMBIENT CORPORATION, ET AL., INTERVENORS

No. 06-1343

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

524 F.3d 227; 2008 U.S. App. LEXIS 11704; 44 Comm. Reg. (P & F) 1258

October 23, 2007, Argued

April 25, 2008, Decided

* * * *

The Commission has chosen to rely on the data in those studies and to place the redacted studies in the rulemaking record. Individual pages relied upon by the Commission reveal that the unredacted portions **[**27]** are likely to contain evidence that could call into question the Commission's decision to promulgate the rule. Under the circumstances, the Commission can point to no authority allowing it to rely on the studies in a rulemaking but hide from the public parts of the studies that may contain contrary evidence, inconvenient qualifications, or relevant explanations of the methodology employed. The Commission has not suggested that any other confidentiality considerations would be implicated were the unredacted studies made public for notice and comment. The Commission also has not suggested that the redacted portions of the studies contain only "supplementary information" merely "clarify[ing], expand[ing], or amend[ing] other data that has been offered for comment." *See Chamber of Commerce II,* 443 F.3d at 903. Of course, it is within the Commission's prerogative to credit only certain parts of the studies. But what it did here was redact parts of those studies that are inextricably bound to the studies as a whole and thus to the data upon which the Commission has stated it relied, parts that explain the otherwise unidentified methodology underlying data cited by the Commission for its **[**28]** conclusions, and parts that signal caution about that data. This is a critical distinction and no precedent sanctions such a "hide and seek" application of the APA's notice and comment requirements. *See Gerber,* 294 F.3d at 181 (quoting *MCI Telecomms. Corp. v. FCC,* 313 U.S. App. D.C. 51, 57 F.3d 1136, 1142 (D.C. Cir. 1995)).

As our colleague notes, *see* Concurring & Dissenting Op. by Judge Kavanaugh at 3, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978), the Supreme Court has limited the extent that a court may order additional agency procedures, but the procedures invalidated in *Vermont Yankee* were not anchored to any statutory provision. *See id.* at 548; Richard J. Pierce, Jr., *Waiting for* Vermont Yankee III, IV, *and* V? *A Response to Beermann and Lawson,* 75 GEO. WASH. L. REV. 902, 917 (2007). By contrast, the court does not impose any new procedures for the regulatory process, but merely applies settled law to the facts. The Commission made the choice to engage in notice-and-comment rulemaking and to rely on parts of its redacted studies as a basis for the rule. The court, consequently, is not imposing new procedures but enforcing the agency's procedural choice **[**29]** by ensuring that it conforms to APA requirements. It is one thing for the Commission to give notice and make available for comment the studies on which it relied in formulating the rule while explaining its non-reliance on **[*240]** certain parts. It is quite another

thing to provide notice and an opportunity for comment on only those parts of the studies that the Commission likes best. Moreover, [HN11] the court's precedent construing section 553 to require agencies to release for comment the "technical studies and data" or "staff reports" on which they rely during a rulemaking, *see, e.g., Conn. Light & Power Co.,* 673 F.2d at 530; *NARUC,* 737 F.2d at 1121, is not inconsistent with the view that "the *Portland Cement* doctrine should be limited to *studies on which the agency actually relies* to support its final rule." 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 437 (4th ed. 2002) (emphasis added).

On remand, the Commission shall make available for notice and comment the unredacted "technical studies and data that it has employed in reaching [its] decisions," *Conn. Light & Power Co.,* 673 F.2d at 530; *see Chamber of Commerce II,* 443 F.3d at 903; *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1403 (9th Cir. 1995); **[**30]** *see also Mortgage Investors Corp. v. Gober,* 220 F.3d 1375, 1380 (Fed. Cir. 2000), and shall make them part of the rulemaking record. In view of the remand, the court does not reach the **League's** contention that the late disclosure of redacted portions of the studies also violated the APA.